

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

YOBANY PEREZ)	
Claimant)	
V.)	
)	
RODROCK HOMES OF JOHNSON COUNTY)	
AND ROCHA FRAMING)	
Respondents)	Docket No. 1,070,381
AND)	
)	
DEPOSITORS INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the February 23, 2015, Preliminary Order entered by Administrative Law Judge (ALJ) Steven J. Howard. C. Albert Herdoiza of Kansas City, Kansas, appeared for claimant. David J. Bogdan of Overland Park, Kansas, appeared for Rodrock Homes of Johnson County (Rodrock) and Depositors Insurance Company (Depositors). Jeffrey S. Austin of Overland Park, Kansas, appeared for the Kansas Workers Compensation Fund (Fund). There was no appearance for Rocha Framing.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 17, 2015, preliminary hearing; the transcript of the October 14, 2014, preliminary hearing; the transcript of the February 13, 2015, deposition of Steve Campbell and exhibits thereto; the transcript of the January 14, 2015, deposition of Sergio Salas and exhibits thereto; the transcript of the October 31, 2014, deposition of claimant and exhibits thereto; the transcript of the August 11, 2014, discovery deposition of claimant; the January 20, 2015, independent medical evaluation report by Dr. Terrence Pratt; and all pleadings contained in the administrative file.

ISSUES

Claimant was injured in an automobile accident while going to lunch in Rocha Framing's van. Rocha Framing was a subcontractor of Rodrock. The ALJ determined claimant's accident did not arise out of and in the course of his employment.

Claimant appeals, asserting his accident arose out of and in the course of his employment. Rodrock and Depositors argue claimant had left work for lunch and the going and coming rule applies. Further, they argue claimant was not hurt on Rodrock's premises and they are not liable pursuant to K.S.A. 44-503(d). The Fund did not file a brief.

The issue is: did claimant's accident and resulting injuries arise out of and in the course of his employment with Rocha Framing?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant testified he was employed by Rocha Framing in residential construction. Claimant described Fabian Rocha (Fabian) as the owner and his boss, but not the highest boss. Claimant also testified Anselmo Rocha (Anselmo) was the owner. He testified Fabian, Anselmo and Roberto Rocha ran Rocha Framing together. Claimant went to work for Rocha Framing about one or two months before his May 16, 2014, accident. Fabian told claimant what to do. Claimant indicated he never met anyone from Rodrock.

When claimant worked for Rocha Framing, he lived in Olathe and did not own a vehicle. Fabian, driving a van, picked up claimant at his home. Fabian also picked up five or six other workers. According to claimant, the van did not have a Rocha Framing logo or decal. There was also a second van that transported workers to work and other workers provided their own transportation. At the end of the workday, those workers transported to work in a van would be transported to their homes in the van. Claimant testified as follows:

Q. Now, did Fabian tell you you had to go to lunch with him?

A. All the time, all the time he will be driving us. He will pick us up in the morning, he will take us to lunch and then he will take us home after work.

Q. When he picked you up in the morning, took you to lunch, took you home after work, you wanted to go with him, correct?

A. Well, yes, that was the routes to work, of course.

Q. But that was your choice to ride with him?

A. Well, why else? I mean, if the company is offering that route to pick you up and bring you back and take you everywhere, I mean, why not.

Q. But the company didn't force you to do that?

A. At no time did the company force me to do that. It's just that they offered me that when I went there. When they hired me, they told me, [w]e have a van, we can pick you up, take you to lunch and bring you back home every day, so we can do that for you every day.¹

Claimant testified he never brought his lunch to work. When he went to lunch he paid for his own meal. He also testified:

Q. And did you get in the van to go to lunch because you had been told to do so by your employer?

A. Well, of course, yes.²

Claimant was paid by the hour and testified he received paychecks from Rocha Framing. He testified that at his request, his paychecks were made out to his roommate, Juan Avila. All the workers would be transported to the bank by Mr. Rocha in the van so they could cash their checks. Mr. Avila would cash the paycheck made out to him for claimant's wages and give the money to claimant.

On May 16, 2014, Rocha Framing employees were working on a house in Overland Park. At lunchtime, claimant and some co-workers were transported by Fabian to eat lunch at McDonald's, when the van they were riding in was struck by another vehicle. Claimant indicated he sustained low back, left hip and left leg injuries. Five people were in the van. Claimant was in the backseat and had his seat belt buckled. After the accident, claimant was transported by a different van back to the job site. He tried working, but was unable to do so because of his injuries. Claimant called a friend, who took claimant to the emergency room.

Claimant indicated he was told by the doctor at the emergency room that he should contact Rocha Framing about insurance. Claimant did so after being released from the emergency room. According to claimant, he was told by Anselmo to find the person whose vehicle struck the van and that person's insurance would pay for everything. Claimant has not worked since his accident.

¹ Claimant Depo. (Oct. 31, 2014) at 13-14.

² *Id.* at 34.

Steve Campbell, vice president of construction for Rodrock, testified Rodrock hires subcontractors to build homes. Mr. Campbell verified Rocha Framing was hired as a subcontractor to help construct a home at 16801 Haskins Street, Overland Park, Kansas. Mr. Campbell dealt with Anselmo. Rocha Framing would hire its own employees and Rodrock had no involvement in that process. According to Mr. Campbell, Rodrock is not on the job sites daily and does not supervise a subcontractor's employees. Mr. Campbell indicated Rodrock requires a certificate of insurance and a subcontractor agreement from every subcontractor. However, he acknowledged Rocha Framing did not have workers compensation insurance on May 16, 2014.

Mr. Campbell indicated Rodrock has nothing to do with transporting a subcontractor's employees to and from work. He testified Rocha Framing determines the hours and days its employees work and how and when it pays its employees.

Sergio Salas, owner and operator of Smart Solutions, LLC, testified that his company takes care of the automobile and commercial insurance needs of people. On August 12, 2013, Roberto Rocha made an application for workers compensation insurance. That policy was cancelled on October 31, 2013, for nonpayment of the premium. Rocha Framing then made an application for workers compensation insurance on June 11, 2014.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."⁴

K.S.A. 44-503, in part, states:

(a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where

³ K.S.A. 2013 Supp. 44-501b(c).

⁴ K.S.A. 2013 Supp. 44-508(h).

compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed. For the purposes of this subsection, a worker shall not include an individual who is a self-employed subcontractor.

. . .

(d) This section shall not apply to any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken to execute work or which are otherwise under the principal's control or management, or on, in or about the execution of such work under the principal's control or management.

K.S.A. 2013 Supp. 44-508(f)(3)(B) states:

The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

Claimant asserts his accident and resulting injuries arose out of and in the course of his employment. This Board Member disagrees. Claimant argues he was a captive employee who was required to ride in Rocha Framing's van to and from work, to and from lunch and to cash checks at the bank. Therefore, those activities were an integral and substantial part of the work claimant performed. Claimant's brief states that if claimant refused to be transported to and from work, to and from lunch and to and from cashing his checks, he would no longer have a job. That allegation is not supported by the record. Claimant indicated he was not forced to go to and from work or to lunch in Rocha Framing's van, but was offered the opportunity to do so. Claimant presented insufficient evidence that he was forced to go to lunch or the bank in Rocha Framing's van. Those activities were not an integral part of claimant's work.

In his brief, claimant asserts respondent erroneously relies on the going and coming exception set forth in K.S.A. 2013 Supp. 44-508(f)(3)(B). Here, claimant had completed the morning part of his workday and was going from work. Therefore, the going and

coming rule applies. The question is whether one of the exceptions in K.S.A. 2013 Supp. 44-508(f)(3)(B) to the going and coming rule applies. The fact that claimant was being provided transportation by Rocha Framing does not create an exception to the going and coming rule.

Claimant asserts his circumstances are similar to those of *Williams*.⁵ This Board Member does not concur. In *Williams*, Petromark's job sites were remote and ever-changing and Williams would not be employed if he was unwilling to travel to those sites. Williams was injured on the way home after completing his workday. Here, claimant lived in the same metropolitan area as where he worked. His job sites varied, but were not remote, like those in *Williams*. Claimant was injured going from work to lunch, not from going home at the end of the workday. Claimant was not forced to go to lunch in Rocha Framing's van, as alleged by his counsel.

Claimant asserts Rocha Framing benefitted by providing transportation to and from work, lunch and the bank. This Board Member agrees providing transportation to and from work may have mutually benefitted Rocha Framing and claimant. Claimant's argument that providing transportation to and from lunch benefitted Rocha Framing because it ensured workers received nourishment to complete the afternoon work and returned to work on time has little merit.

The Board has generally held that an accident is not compensable when a worker sustains an accident during a lunch break.⁶ Claimant was on a lunch break, not on Rocha Framing or Rodrock's premises, when the accident occurred. Therefore, this Board Member finds claimant's accident did not arise out of and in the course of his employment because he was going from work.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

⁵ *Williams v. Petromark Drilling*, 299 Kan. 792, 326 P.3d 1057 (2014).

⁶ See *Laturner v. Quaker Hill Nursing, LLC*, No. 1,059,381, 2012 WL 6101119 (Kan. WCAB Nov. 1, 2012); *Curless v. Southern Education Council*, No. 233,051, 1998 WL 847163 (Kan. WCAB Nov. 4, 1998) and *Vaughn v. City of Wichita*, No. 184,562, 1998 WL 100158 (Kan. WCAB Feb. 17, 1998).

⁷ K.S.A. 2013 Supp. 44-534a.

⁸ K.S.A. 2013 Supp. 44-555c(j).

WHEREFORE, the undersigned Board Member affirms the February 23, 2015, Preliminary Order entered by ALJ Howard.

IT IS SO ORDERED.

Dated this ____ day of April, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Steven J. Howard, Administrative Law Judge